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Ralph Ostler v. Albina Transfer Co : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS

RALPH OSTLER, Plaintiff, vs. ALBINA TRANSFER CO., INC. F & R ROE, INC., and STANLEY E. WHEELER, Defendants.	PETITION FOR RECONSIDERATION Case No. 88-0228-CA

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POINT I

THE SUPERFICIAL TREATMENT OF THIS CASE IS A GRAVE MISCARRIAGE OF JUSTICE

This is not Robert DeBry's case. Nor is this Dayle Jeff's case. Nor is this Judge Bench's case. No lawyer or judge should have a false pride in winning the case; or in losing the case; or in writing an opinion; or in changing an opinion. Presumably, the attorneys on both sides, as well as the entire panel of judges, have a joint goal of seeking justice.

This is Ralph Ostler's case. Ralph Ostler lost half his body -- from the waist down. He deserves a thoughtful, informed, reasoned analysis by each judge. Unfortunately, that is not what he got. What Ralph Ostler got was a superficial Opinion that did not even touch on the core issues. Ralph will spend his lifetime in a wheelchair. Surely his case merits a few extra hours of time by the judges.

Because of the superficial treatment of issues in this case, Ostler has employed an expert to determine whether the decision making process has broken down in this case. The experts opinion is attached as Exhibit A.

Ostler's expert is chairperson of the Department of Philosophy at the University of Utah. Plaintiff's expert has rated the quality of this Court's Opinion as a D or E grade. This is not intended to criticize or embarrass the Court. Rather, this is an attempt to assist the Court from committing a grave injustice. Hopefully the Court will be inclined to thank counsel, rather than to retaliate.

POINT II

REHEARING IS NECESSARY BECAUSE THIS COURT FAILED TO FOLLOW BINDING AND RECENT PRECEDENT FROM THE UNITED STATES SUPREME COURT

A major issue in the case was that Ostler's expert was not permitted to testify on the "moth phenomenon." The trial court reasoned that such testimony was not admissible until a foundation could be laid that father Ostler was awake just prior to the accident. (See Brief of Appellant at p. 6.) This court echoed the trial court's reasoning:

> [T]he theory was premised on the fact that a driver must be awake in order to be so "lured" . . . without this foundation, the Court determined that the expert testimony would not be helpful to the jury . . .

Slip Opinion, at p. 4.

However, this Court overlooked the recent case of Huddleston v. United States, 108 S.Ct. 1496; 99 L.Ed 2d 771 (1988):

> In determining whether the government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.

(Compare, Brief of Appellant at p. 6 & 7.)

In this case, there was abundant evidence from which the jury could have concluded that father Ostler was awake. (See, Brief of Appellant at p. 4 & 5.) Contrary to Huddleston, the trial court did not permit the evidence of the preliminary fact issue to go to the jury. Nor did the trial court apply the Huddleston analysis. (viz, whether the jury could reasonably find from the evidence that father Ostler was awake.) This is not a matter of discretion. Huddleston must be applied to the facts of this case.

POINT III

REHEARING IS NECESSARY BECAUSE THIS COURT FAILED TO FOLLOW BINDING RECENT PRECEDENT FROM THE UTAH SUPREME COURT

A second major issue in the case was that defendant Wheeler had misstated the law in his closing argument. (See generally, Brief of Appellant at p. 33.) This Court's Opinion holds that any error was cured by the following comments of the judge:

> The jury is directed to look at the instructions. They set forth the law in that regard. Statement of counsel is to be disregarded except as it is accurate.

Slip Opinion, at p. 8.

However; this Court's Opinion was absolutely silent on the issue of whether such a statement was sufficient to cure the error. Strangely, this Court's Opinion relies upon Halford v. Yandell, 558 S.W.2d 400 (Mo. App. 1977). However, Halford, squarely holds that such comments by the Court are not sufficient to cure the error.

More importantly, this Court's Opinion totally ignores the recent Utah Supreme Court case of State v. Shickles, 760 P.2d 291 (Utah 1988). (See discussion at Brief of Appellant at p. 35 & 36.) A proper application of the Shickles case should have led to a reversal.

POINT IV

REHEARING IS NECESSARY BECAUSE THIS COURT HAS FAILED TO CONSIDER THREE SIGNIFICANT DEFECTS IN THE COURT'S JURY INSTRUCTIONS

Ostler challenged the Court's instruction on independent intervening cause on four grounds: first, failure to define the term intervening independent cause; second, that foreseeability is only one test (not the sole test) to determine causation; third, that only a generalized risk of harm

need be foreseeable; and fourth, confusion. (See generally, Brief of Appellant at p. 56-58.)

This Court's Opinion deals only with the fourth issue: viz. confusion. Rehearing is necessary to analyze the other three defects in the jury instructions.[1]

With respect to the fourth issue, this Court ruled that the confusion was not "substantial or prejudicial". In Harris v. Utah Transit Authority, 671 P.2d 217 (Utah 1983), the Supreme Court reversed, in part, upon the confusion of an instruction on superceding cause. It is obvious that the Utah Supreme Court regards confusion regarding superceding cause to be serious enough for reversal.

POINT V

REHEARING IS NECESSARY BECAUSE THIS COURT'S OPINION FAILED TO CONSIDER AN ALTERNATIVE THEORY OF LIABILITY

There were two theories of liability:

First, that Wheeler was unlawfully parked on the side of the road in violation of §41-6-103(i)(i). As this Court has pointed out, that theory was conceded by the defense, and the

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[1] It is true that the Court did instruct the jury on concurrent negligence. (Slip opinion p. 9.) However, concurrent negligence does not "fill the gap." The instruction on concurrent negligence does not inform the jury of the dividing line between concurrent cause and intervening cause.

Court directed a verdict on liability (but reserved on proximate cause).

The second theory of liability was that Wheeler was parked on a controlled access highway for more than 10 minutes. This theory was not conceded.

However, this Court has failed to appreciate that the chain of causation is different depending upon which theory of liability applies. Thus, a truck parked for less than 10 minutes must simply turn on blinking lights. But a truck parked for more than 10 minutes must additionally put out flares or triangles. (See generally, Brief of Appellant at p. 12.) Ostler's expert exclaimed that flares and triangles offer an additional measure of protection for the passing motorist and that the accident could have been avoided if this additional warning had been in place. (Transcript, 232-233, 284.) In short, the absence of flares is an additional basis for proximate cause. This Court's Opinion simply overlooked this second theory of liability.

POINT VI

REHEARING IS NECESSARY BECAUSE THE COURT HAS OVERLOOKED RESTATEMENT 442 AND 447

This Court glossed over the claim for a directed verdict by saying that it was a jury issue. However, our Supreme

Court has adopted Section 442 of the Restatement[2]. If this Court also accepts Section 447 of the Restatement, there is no jury issue. The result must follow as a matter of logic. Indeed, the illustration of Section 447 of the Restatement is very similar to this case:

> A loads his truck so carelessly that a slight jolt might cause its heavy contents to fall from it. He parks it in a street where to his knowledge small boys congregate for play. B, one of the boys, tries to climb on the truck. In so doing, he disturbs the load as he causes a heavy article to fall upon and hurt C, a comrade standing close by. B's act is not a superseding cause of C's harm.

Reply Brief of Appellant at Appendix Two.

To dispose of Ostler's motion for a directed verdict without analyzing the interplay between Section 442 and 447 of the Restatement is grossly superficial.

DATED this 21 day of September, 1989.

ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff

By _____
ROBERT J. DEBRY

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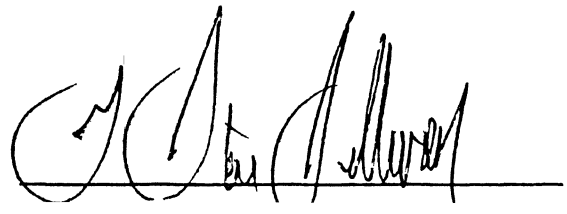
[2] Harris v. Utah Transit Authority, 671 P.2d 217, 219 (Utah 1983).

CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of the foregoing PETITION FOR RECONSIDERATION (Ostler v. Albina, et al.) was mailed, U.S. Mail, postage prepaid, this 21st day of September, 1989, to the following:

M. Dayle Jeffs
JEFFS & JEFFS
90 North 100 East
Provo, UT 84603



0566-120/jn

CERTIFICATE OF COUNSEL

Robert J. DeBry, attorney for appellant Ralph Ostler, certifies that the foregoing Petition for Reconsideration is filed in good faith, and not for purposes of delay.

DATED this 21 day of September, 1989.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By _____
ROBERT J. DEBRY

EXHIBIT A

UTAH COURT OF APPEALS

RALPH OSTLER,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF
	)	PATRICIA HANNA
vs.	)	
	)	
ALBINA TRANSFER CO., INC.	)	
OF & R ROE, INC., and	)	Case No. 88-00228-CA
STANLEY E. WHEELER,	)	
	)	
Defendants.	)	

STATE OF UTAH	)	
	)	ss.
COUNTY OF SALT LAKE	)	

My name is Patricia Hanna. I give the following testimony under oath:

1. I hold a Ph.D. in Philosophy from the University of Cincinnati.

2. I am chairperson of the Department of Philosophy at the University of Utah.

3. I am not a lawyer nor am I trained in law. However, I am trained in logic and argumentation. Indeed, the field of philosophy is in large measure devoted to the study of arguments and the process of analytic reasoning. I have taught classes in deductive and inductive logic, as well as in epistemology (theory of knowledge) and scientific inquiry. My curriculum vita is attached.

4. I have been asked by Robert J. DeBry to read the Opinion of the Utah Court of Appeals in Ostler v. Albina, et al. I have been asked to render an opinion of that Opinion. Since I am not an attorney, I have not been asked to determine if the Opinion is right or wrong. Rather, I have been asked to determine the extent to which the Opinion fairly analyzes issues raised in the briefs.

5. I have read the briefs of both parties, the Opinion of the Court of Appeals, and I have had trial transcripts available for cross-checking.

6. In my opinion, this Opinion reflects a breakdown in the decision making process. If this Opinion had been written by one of my undergraduate students as an exercise in a course, I would have given it a grade of 'D;' from a graduate student, it would have counted as failing work.

7. In my opinion, it is difficult to understand how this Opinion could have been endorsed by three judges. Due to time pressures or misunderstandings, a single individual might fail to grasp the points at issue and the structure of the plaintiff's arguments; however, it seems highly unlikely that three individuals could all have made the same errors in analysis. I can only conclude that the Opinion was the product of a single judge (Bench), and that the other two judges signed it without giving the briefs the careful and detailed reading and analysis which they deserved and required.

8. My detailed analysis of the Court's Opinion follows:

General Structure of Appeal

There is an underlying argument in the appeal which ties together 9 of the initial 11 points in the Appellant's Substitute Brief (Points I, II, III, IV, V, VII, IX, X and XI); without an understanding of this argument, the merit of these points cannot be properly assessed or appreciated. In addition, Point VI is substantively affected by the issues involved in the above mentioned 9 points.[1] Unless the appeal is viewed in terms of the unifying argument, it is in my judgment impossible to appreciate its full force.

In the very roughest terms, the underlying argument comes to this. The case of Ralph Ostler (hereafter, Ostler) against Stanley Wheeler (hereafter, Wheeler)*et al.* cannot be resolved without a decision on the issues of proximate cause, superseding intervening independent cause and division of liability. In order for the jury to reach a reasoned conclusion on these issues, it would have to be given access to certain facts and/or scientifically or factually based theories, and to be given a clear presentation of the law as it bears on these issues; in the absence of such access, either the jury could not fulfill its responsibility or it should have been given a directed verdict against Wheeler on causation, and asked only to determine the extent of Wheeler's liability.

In the Court of Appeals' decision, several failures in assessment recur. First, the Court of Appeals fails to account for the interrelated nature of the arguments in the appeal; if each point is taken individually and out of context, it is impossible to reach a sound judgment on the plaintiff's case. Second, the Court of Appeals shows absolutely no appreciation of the fact that certain circumstances or facts may have a bearing on more than one aspect of the case. This is most evident in the case of negligence and proximate cause. While it might be understandable

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[1] The Appellate Court makes no ruling on this aspect of the appeal, and hence offers no argumentation supporting its de facto denial of the appeal. This seems a significant omission given that the point is discussed in the Appellant's Substitute Brief on pp. 38-40, and in the Reply Brief on pp. 45-48.

that the trial judge, under the various time constraints and pressures imposed by an on-going trial, might fail to appreciate this point, one would suppose that the appeals process is in part intended to correct for this by allowing three judges who have more time and distance to reflect on the matter. This does not seem to have been the case; consequently, I can only conclude that the decision making process suffered a serious breakdown in the present case.

In what follows, I shall indicate how this argument is made and sustained throughout the documentation presented to the Court of Appeals on Ralph Ostler's behalf, and indicate how and where the Court of Appeals' decision to reject the appeal fails to take account of or the address the points raised by Ostler's counsel. I shall comment only on the 9 points involved in the argument, and the judgments reached on these points.

Assumptions

There is no dispute on the following: Wheeler negligently parked his semi-truck in the emergency lane on I-15 between Santaquin and Payson, Utah. He failed to set out flashers or triangles marking the presence of his truck, and at @ 2:00 a.m. (P.S.T.), Stephen Ostler's (hereafter father Ostler) pick-up truck, with Ostler asleep in the bed of the truck, ran into the back of Wheeler's truck. Throughout, I will take these as given.

Point I

This contains the clearest statement of the general argument of the appeal, and sets the stage for what follows. It is argued that although a major portion of the trial revolved around the issue of proximate cause, almost all of the evidence proffered by Ostler was rejected by the trial court. As a result, when the trial court refused to direct a verdict against Wheeler on the issue of causation, on the grounds that it is a matter of fact which should properly be determined by the jury (Point XI), the jury had seen none of the evidence which Ostler considered relevant this decision.

In the absence of clear proof that this evidence lacked all merit, this creates a serious problem for both procedural and substantive

fairness. In rejecting Ostler's evidence, the trial court gives either no indication that the reason for denying the jury access to the evidence was that the evidence was entirely without merit.[2] Instead, the evidence is rejected on at least one of three grounds: 1. because it was held to be irrelevant to the issue of proximate causation, 2. because it was felt that it would confuse the jurors, and 3. because it was felt that the jurors already were fully aware of the phenomena. The appeal argues that these grounds are all inadequate.[3]

1. The "moth-phenomenon", Wheeler's failure to use emergency devices, and denial of presentation of 're-created' accident without truck in emergency lane

The evidence related to the moth phenomenon consists in a theory, which is said to be widely recognized, that at night tail-lights, whether flashing or not, have a tendency to "lure" sleepy drivers towards them, much as a moth is drawn to a light. Thus, if father Ostler was awake at the time of the accident, Wheeler's tail-lights might have exerted this "luring" effect on him, causing him to drive into the back of Wheeler's truck.

In the case of the emergency devices, flares and/or triangles, Ostler was not allowed to introduce into evidence expert testimony that had such devices been in place, the accident would most likely have been avoided.

One of the expert witnesses "re-created" the accident at the exact location, and concluded on the basis of this recreation that if the truck had not been present in the emergency lane, it was most likely that the Ostler pick-up would have rolled unharmed into a field.

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[2] At one point counsel for the defense raises a question about the qualifications of Mr. Hulbert to testify on the matter of the so-called "moth-phenomenon;" however, it is clear from the transcript of the trial that any alleged lack of expertise had nothing to do with the trial judge's decision to reject the evidence (Transcript of Trial, p. 245).

[3] I have regrouped the sub-points under I according to their logical connections.

In all three cases the evidence was rejected on the grounds that it would not be helpful to the jury, because it was not clear whether father Ostler was awake or asleep. Taking each point in isolation, might give this a reasonable appearance; however, taking them in isolation overlooks the fact that Ostler is trying to present a larger argument, which will be explained below, and that Ostler also proposed introducing evidence to support the claim that father Ostler was awake, but drowsy, at the time of the accident.

2. Was father Ostler awake?

The next pieces of evidence rejected by the trial court concern whether or not father Ostler was awake; if the appropriateness of the moth phenomenon, Wheeler's failure to place emergency devices and the pertinence of the re-created accident are all dependent on the answer to the question whether father Ostler was awake, it would seem reasonable to allow the jury to deliberate on the evidence relating to this matter. However, the trial court ruled that because the evidence was not decisive (or conclusive) it was inappropriate.

Ostler cites Rule 104(b) and interpretations of it to support his claim that this ruling was based on a misinterpretation of the law. As a legal layman, it seems to me that the case is this: Rule 104(b) says that if the evidence strong enough to give prima facie support to a judgment that something is or is not the case, the trial court should allow the jury to hear that evidence and reach its own decision. In the case at hand, the trial court denied the jury access to the evidence on the grounds that the evidence was not conclusive. It strikes me that if indeed this were the standard, there would be precious little for a jury ever to deliberate; all the evidence they would ever be given would be such that "no reasonable mind could disagree" and one might suppose all juries would ever hear would be directed verdicts.

The Court of Appeals gives no sign of having appreciated the logic of Ostler's point here in denying the appeal. In its decision the Court of Appeals gives little attention to this part of the appeal. What attention it

does give falls victim to the same mistake made by the trial court, saying only that "Plaintiff's own expert admitted that there was no conclusive way to determine Stephen Ostler's state of consciousness prior to the accident" (Opinion, p. 4). In light of Ostler's point, this statement is simply beside the point and seems to be completely out of context.

3. Wheeler's violation of the 10-, 15- and 70- hour rules

Ostler attempted to introduce evidence showing that Wheeler was in violation of several federal regulations governing interstate truck drivers; in the case at hand, the point of this evidence was to show that Wheeler was exhausted at the time he stopped in the emergency lane. The relevance of Wheeler's exhaustion is two-fold. One, it contributes to his negligence; the decision to rule it out because negligence was not relevant, having been determined in a directed verdict, is reasonable. However, it also relates to the issues of proximate cause and liability. Exhaustion contributes to an exercise of poor judgment; given Wheeler's position and responsibilities, evidence that he was exhausted would affect whether and to what extent he should be held liable. Further, if Wheeler stopped in the emergency lane because he was exhausted and needed to urinate as a consequence of drinking too much coffee in an attempt to stay awake, this would have a bearing on his culpability. The Court of Appeals comments only that this (like all the other issues) "goes to the issue of Wheeler's negligence, a matter previously decided by directed verdict, and may be excluded as irrelevant. See Utah R. Evid. 402 ("evidence which is not relevant is not admissible.")" (Opinion, p. 6).

4. The purpose of the emergency lane, foreseeability of possibility of such an incident in designing highways, and Wheeler's foreseen such a possibility

Ostler tried to introduce expert testimony relating to these issues to show that, as an interstate truck driver, Wheeler was 1) aware of the intended use of emergency lanes, 2) instructed not to use them unless there was a bona fide emergency because of their intended function (to provide a buffer zone for straying vehicles to make corrections within, showing that it was foreseen by highway designers that vehicles would

occasionally leave the road surface and stray into the emergency lane), and 3) capable himself of foreseeing that such a thing might happen.

Insofar as foreseeability is relevant to proximate cause, this evidence clearly is related to that issue. It was disallowed on the grounds that it only related to negligence, and that all these matters were "common knowledge." The Court of Appeals upheld the trial court's ruling. This is a mistake on two grounds, 1) because it fails to take account of the fact that one circumstance may relate to more than one issue,in this case the circumstances are relevant both to negligence and to proximate cause; and 2) because Ostler argues that these issues are not common knowledge.

Admissibility of this evidence

Ostler argues that all this evidence was relevant to the case and should have been admitted. In order to see that this is so, one needs to understand the argument which Ostler offers to the Court of Appeals in order to support his contention that Wheeler was negligent, one of the proximate causes of his injury and, therefore, liable.

This type of argument is called a constructive dilemma; it is a well-understood and valid form of argument.[4]

1. Either father Ostler was awake or asleep at the time of the accident.

2. If he was awake, then Wheeler's truck exerted a luring effect on him, causing him to veer off the road; in the absence of flashers or triangles, Wheeler's truck was one of the proximate causes of the accident (father Ostler's driving itself being the other), and Wheeler is therefore liable for the accident.

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[4] According to William Kneale and Martha Kneale, The Development of Logic (London: 1962), dilemma has been recognized as a valid mode of argumentation since the second century A.D., when it appears in the writings of Hermogenes (p. 178).

3. If, on the other hand, father Ostler was asleep, then while there was no luring effect, Wheeler's truck parked in the emergency lane without flashers or triangles still remains as one of the proximate causes of the accident. Had the truck not been there, there would have been no accident. Again, Wheeler is liable as one of the proximate causes.

4. Therefore, regardless of whether father Ostler was awake or asleep, Wheeler's parking his truck in the emergency lane stands as a proximate cause of the accident, and consequently Wheeler is at least partially liable for the accident.[5]

To argue that taken piece-by-piece the evidence would not be helpful to the jury and to exclude it on that ground is prejudicial since it prevented Ostler's constructing this argument; further,to argue that each piece of evidence is disallowed because it relates to negligence and negligence is not an issue, is to take too narrow a view of the nature of events. Many features of the world are relevant to different aspects of our lives. For example, the fact that the sky is blue is surely relevant (pertains) to the artist trying to paint a landscape, but this does not make it irrelevant to the astronomer trying to explain the nature of our atmosphere and light's reaction to it. So too, the fact that all the evidence had a bearing on negligence did not *ipso facto* render it ineligible for consideration by the jury in connection with the issue of proximate cause. This is especially so given the fact that the issue of proximate cause was the key to the decision. The Court of Appeals' decision shows absolutely no appreciation of this fact, and in no sense addresses it. Indeed the already quoted passage on p. 6 of the Opinion clearly demonstrates this.

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[5] A similar argument can be constructed to show that whether father Ostler was awake or asleep, emergency devices would have most likely avoided the accident. Had the emergency devices been in place, then if father Ostler was asleep, running over the triangles would most likely have awakened him, thus avoiding the accident; had he not been asleep, the devices would have alerted him to the truck and allowed him to avoid at the accident. With the devices, the accident would have been avoidable; therefore, whether father Ostler is awake or asleep at the time of the accident, the truck without emergency devices in place, is one of the proximate causes of the accident.

Further, in several instances the evidence was ruled out on the grounds that the jury already knew everything being discussed; afterall, they had driven of interstate highways, driven at night, etc. Ostler presents strong evidence that under one, and perhaps the most relevant, standard of admissibility of expert testimony, the trial judge misapplied the law and held Ostler's witnesses to too high a standard. The Court of Appeals simply endorses the trial court's ruling, and had no discussion of Ostler's arguments against this decision.

The common law standard allows expert testimony to be excluded if it concerns information which in within the common knowledge of the jury. Under this standard, since we all can understand the use of emergency lanes (and no doubt at one time read a description of them) and since we can understand the "moth phenomenon" and no doubt relate it to personal experiences, there is no need for experts to tell us about them. However, under Rule 702 which supersedes the common law standard, this requirement is relaxed. It is now no longer necessary to show that the expert knows something that the jury doesn't know, all that is necessary is that the expert be able to make the facts perspicuous to the jury and that the expert's testimony not prejudge the case.

Rule 702 states

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. (Emphasis added.)
>
> Under Rule 702, an expert can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult [though] not beyond ordinary understanding.

United States v. Downing, 753 F.2d 1224, 1229 (3rd Cir. 1985) (Appellant's Substitute Brief, p. 18).

In the case at hand, Ostler argues that the jury was fully capable of understanding all the excluded evidence, but that it was essential to have that evidence placed clearly before them. Specifically: 1) Members of the jury may all have been sleepy drivers at one time, but this does not entail that they all know about the moth phenomenon or how it operates so as to cause a merely sleepy driver to leave the road in a fashion one might think possible only for driver who was in fact asleep. 2) There is no reason to suppose that the jurors knew about the different reactions caused in a sleepy driver by steady tail-lights, blinking tail-lights, and flares; or how these reactions can affect the outcome in a situation like that at issue. 3) It is unclear that the average driver actually understands the intended function of an emergency lane (indeed causal observation might indicate that it is perfectly clear that they do not). 4) Nor is there any antecedent reason to think that the average juror has the slightest idea that interstate truckers are held, by federal regulation, to significantly higher standards than are ordinary drivers.

In the present case of most of the evidence at hand, not only did the jury need to have it made clear (as Rule 702 allows), but it is overwhelmingly likely that they needed simply to be make aware of it (as the higher common law standard requires). Not knowing these facts has a clear impact on the decision concerning foreseeability on Wheeler's part, and on a judgment of Wheeler's liability.

Yet the trial judge disallowed this testimony all on the grounds that no expertise was needed to understand it. The Court of Appeals argues that in the absence of proof on Ostler's part that this omission was substantive an prejudicial, it can see no basis of overturning the trial judge's ruling. It is admitted by all parties that the trial judge has wide discretion in such matters; and that to overrule the trial judge's decision without exceptional evidence for doing so would defeat the purpose of this discretion.

However, this line of reasoning can be carried too far; in Ostler's case it led to a failure on the part of the Court of Appeals to comprehend the nature of the damage exclusion of the evidence did to Ostler's case.

The Court of Appeals sees only one form which an exceptional case could take: each and every piece of evidence taken in isolation would by itself make or break the case. However, as indicated above, Ostler's argument is not an atomistic one; it is an organic or cumulative argument. In denying Ostler's evidence, the Court denied Ostler the chance to tell his side of the story, and consequently denied the jury a viable alternative upon which to make an essentially comparative judgment.

Since no one knew whether father Ostler was awake or asleep, or whether or not Wheeler was exhausted and functioning below the minimum standard to which he is held, the jury had to make a "best case" call with only one case available. In short, the jury was to make a comparative ruling when the available alternatives consist of only one case (comparing A to nothing). In such a case, all the jury had to go on in reaching its decision was whether Wheeler's story made sense; since they had no alternative account of the situation, they could not compare that story with another sensible story to see if one was a better account of what happened. Having concluded that Wheeler's story was coherent, as it is, the jury had no alternative but to rule against Ostler. If they had been allowed access to Ostler's evidence, in virtue of the form of the new deliberation (comparing A to B, where A and B are two different scenarios), the decision drawn might have been different.

Therefore, the Court of Appeals' decision that Ostler does not prove a substantive and prejudicial error is incorrect; it seems to me to show a failure to read the briefs carefully.

Point II and Point III

Restricted cross-examination of Wheeler concerning search for a place to urinate

Wheeler's violation of federal regulations (10-, 15-, and 70- hour rules) was intended to offer evidence of impeachment by bad act

Both concern Ostler's attempt to impeach Wheeler's testimony. The trial judge disallowed the lines of questioning on the ground that it related only to negligence and negligence was irrelevant. Ostler's claim is

that this is a mistake because they relate to proximate cause and liability. The Court of Appeals offers nothing new on this, falling back once again on the stand that if an issue is related to negligence, it is appropriately excluded. There is no evidence that the Court of Appeals appreciates this argument for the dual nature of the testimony.

Point IV

Misstatements during closing defendant's closing statement

In closing remarks, the defendant's counsel stated that the issue was not whether Wheeler could have foreseen that a driver might at some time run off the road into the emergency lane, but whether he could have foreseen that Ostler (or someone else) would have runoff the road into his truck at just that time.

> [T]he foreseeability question is: How was Stan Wheeler expected to foresee that at that precise time, if as Mr. DeBry said, one in a billion chances that it would happen right at that particular time-- (Quoted in Opinion, p. 8).

This clearly is not the standard to foreseeability; if it were, no one would ever be able to foresee anything.

Ostler objected, and the only response of the trial judge was to direct the juror's to their instructions. He did not rule on the objection, clearly leaving the misstatement uncorrected . In some cases this might have caused no harm; however in the case at hand, Ostler argues that it causes harm. The problem with simply directing the jurors's attention to the instructions is that the instructions themselves are unclear, complicated and difficult to understand. This will be discussed in more detail under Point X below.

In the Court of Appeals' ruling, this objection is treated together with Point V. The Court of Appeals notes that the jury was directed to its instructions, and says that taken in context, the remark caused no harm. This decision and the reasoning behind it reflects the Court of Appeals' failure to take the misstatement and its correction in context, viz. the

larger context of the legal issues involved in the jury's deliberations and the fact that their instructions on these matters were unclear and confusing.

Point V

Who Pays

This is related to Point IV since it concerns another misleading statement made during closing. Here there is only an implication that the defendants would have to pay out of their own pockets; hence it is less clearly misleading than in the case of Point IV where the misinformation was clearly stated. The Court of Appeals' ruling on this point seems well taken; unfortunately because Point IV was treated in conjunction with this, the ruling on Point V seems to have been misapplied to Point IV.

Point VII

Jury given incorrect instructions on Wheeler's duty to set out flares or triangles

Wheeler admitted that he didn't set out the emergency devices; I.C.C. regulations requiring that they be set out were read to jury.

> Whenever a vehicle is stopped upon the shoulder of a highway from any cause other than necessary traffic stops, the driver shall as soon as possible, but in any even within 10 minutes, place warning devices [flares or reflective triangles] (I.C.C. rule, quoted in Appeal, p. 41).

Therefore, it is clear that Wheeler had a duty to set out the devices. However, the jury was clearly instructed that this was not so. Instead they were told that the regulations required that the devices be set out only if the driver was parked for 10 minutes or longer or, if parked less than 10 minutes, depending on circumstances.

> However if you find that defendant Wheeler was parked for less than 10 minutes, it is for you to

> determine whether or not Wheeler should nevertheless have set out the flares or triangles under the existing circumstances (appeal p. 42).

This clearly states that whether a truck driver has to set out the emergency devices when stopped for less than 10 minutes is up to the driver's judgment. The Court of Appeals ruled that this instruction, even if substantially incorrect, did not do any harm because it relates only to negligence. Again the Court of Appeals misunderstands Ostler's appeal.

Ostler's point is that the I.C.C. regulation makes it clear that truckers are held to higher standards than are ordinary drivers, e.g., putting on the truck's blinkers is simply not enough; therefore, even if the judge's interpretation of the rule as it applied in the present case were correct (viz., that truckers have leeway in deciding when they need to place emergency devices out when they are stopped), failure to make the actual rule clear was prejudicial against Ostler since it allowed Wheeler to be judged by the lower standards of safety applicable to ordinary drivers.

Further, it is not to the point to say that failure to set out warning devices is related to negligence; of course it is. The point, once again, is that it is also related to proximate cause; on that ground it should have been stated clearly and correctly. It does not help the Court of Appeals' judgment to point out that earlier in the instructions, the I.C.C. regulation was stated correctly. In view of the misstatement, the jury was simply left with two conflicting statements, both dealing with w highly relevant matter, and no direction on how to resolve that conflict.

Point IX

Video tape demonstration

A video was prepared by an expert witness to help the jury decide the issues of proximate cause and superseding intervening cause. Since these decisions require jurors to decide what would have happened if the "cause" (Wheeler's truck's being parked in the emergency lane) had not been there, it is apparent that the jurors are asked to determine the truth

of a counterfactual (a "contrary to the facts" or a "what if" case). The idea is to see what was contributed to the situation by the negligent act; one asks, "but for [the parked truck] what would have transpired?" or "what if the truck hadn't been there; what would have happened then?" Such determinations are notoriously difficult; therefore, it is hard to see how a video showing a scene very much like what seems likely to have obtained at the time of the accident, but without the truck in the emergency lane, could have been anything but helpful.

The trial court disallowed the video on two grounds. First, that the video did not meet the requirements of a re-enactment; it was not similar enough to the incident to count as a re-enactment. Second, that it was just "speculation" (Opinion, p. 5), and as such would not help the jury.

The second is either misguided, or if not misguided then such as to call for a through-going revision of legal standards. In deciding these issues one has no option other than to engage in "speculation;" had the truck in fact not been there, there would be facts to consider, but then there would be no case requiring a decision. If the reason for disallowing the video is jury confusion, then again it seems that one will no longer be allowed to ask juries to make this sort of determination since it is the determination itself, not the video, that is confusing.

Therefore, everything rests on the first ground; and this is in fact the ground most discussed by the Court of Appeals. Here Ostler argues that the standard of similarity applies only to re-enactments, where an attempt is made to come as close as possible to duplicating the actual accident. In such a case, similarity would be very relevant and should be taken very seriously. However, this was not the intention in this case. Here it is apparent and unargued that the video depicted a scene that could <u>not</u> have occurred on the night father Ostler ran into Wheeler's truck; the point of the video is illustrative, to aid the jury in reaching a decision on the issue of proximate cause.

In ruling on the appeal, the Court of Appeals applied a three-prong test: relevance, similarity and non-confusing. It decided that the video failed the first two. It then considered the argument that the video was

not a re-enactment, but an illustration; and upheld the trial court's ruling on the ground that Ostler did not show that disallowing it did any harm or that the trial court abused its discretion.

Once again, the Court of Appeals misses the point. The very nature of decision of proximate cause and superseding intervening causes is by its nature confusing. In view of the vast body of evidence already denied the jury for its deliberations, it is difficult to make a case for the claim that showing them the video would be confusing. At this stage of the trial the video tape was the only hope Ostler had of making the point that Wheeler's truck was not simply something for father Ostler's truck to hit (as though he would have hit something else or rolled over if it hadn't been there), but that but for Wheeler's truck there would have been no accident of the sort that occurred. The video makes the point that Ostler's injuries are not causally overdetermined,[6] but that Wheeler's truck is a necessary causal factor. Both the trial judge and the Court of Appeals fail to see this point.

Point X

Court's instructions on intervening causes was incorrect.

Ostler objected on several points:

1. "Intervening independent cause" was undefined.

2. Foreseeability was not the only test of causation

3. Precise accident rather than general sort of accident was held to be the standard of foreseeability.

4. The instructions were confusing.

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[6] If something is causally overdetermined, it will occur whether or not one of the causes occurs. For example, if I have taken an overdoes of sleeping pills and after I take them you fatally shoot me, we can say that my death was causally overdetermined. Keeping the shooting constant, even if I don't take the pills, I die; keeping the pills constant, even if you don't shoot me, I die.

The Court of Appeals denied the appeal on the ground that the corrections would have been more confusing than the instructions as given, that the contested instructions concern negligence and were therefore harmless because irrelevant, and that Ostler offers no proof that the instructions resulted in a substantive and prejudicial opinion.

This decision one again fails to take account of dual nature of some of the evidence, as well as failing to take account of the context in which the instructions were given and the evidence available to the jury. The jury was to make a decision on an issue without being allowed to hear Ostler's side of the issue (see Point I). Taken in this context, Ostler's case that it is overwhelmingly likely that the jury's ultimate decision was influenced adversely by these confusing and misleading instructions is much stronger than the Court of Appeals' reasoning indicates.

Point XI

Directed verdict on causation

Perhaps the main thrust of this appeal is that the jury was asked to deliberate and decide on an issue, proximate cause, on which they were given none of Ostler's evidence and on which the instructions from the judge were unclear and confusing. In view of this it seems at least unreasonable to ask the jury to reach a decision on the matter; however, in the case at hand the error runs even deeper.

Ostler asked for a directed verdict on causation on the grounds that the trial court's earlier directed verdict on negligence implied a similar verdict on causation. The defendant's response claims that if this were allowed to stand, it would be tantamount to equating negligence and causation; this is simply not so. Ostler argues only that in this case is there an implication from negligence to causation; this does not imply that there is such an implication in every case.

For example, I might park negligently with respect to the wild animals in Yellowstone but not be a proximate cause of your running into my car and causing yourself serious injury, if, for example, I am parked

next to a 300 ft. drop-off which you would have plummeted over in any case. The case at hand is not of this sort. Here the negligence implies causation. This is shown by asking what it was that made the act of parking in the emergency lane negligent. The answer is two-fold: 1) risk to a class of persons which included Ostler and 2) subjecting Ostler to the hazard which lead to his injury (Appellant's Substitute Brief, p. 60). Thus, causation is implied by negligence.

The realization of the hazard was brought about by father Ostler's driving, but that does not negate the fact that Wheeler's parking in the emergency lane is a proximate cause of that injury. The standards cited by Ostler clearly support this contention.[7]

Ostler goes on to argue that in this case the standard for a directed verdict is met: reasonable minds cannot disagree. They cannot disagree because the answer follows by definition from the earlier verdict. In the Appellant's Substitute Brief, p. 62, Ostler makes this clear: " The fact that reasonable minds could not differ on proximate cause is illustrated by the following question: What risks of harm (other than accidents with passing motorists) could make Wheeler's parking negligent? None are apparent." Unfortunately, this is not to say that they will not disagree; otherwise, we would all be A students in mathematics and logic. If we are ill-informed, confused or misled we may well fail to agree even though we are reasonable

The present case is of this unfortunate sort. The jurors were led to draw the wrong conclusion not because it was an open question, but because they were not given the facts which would have led them to draw the correct conclusion. They were neither allowed to judge the issue of causation as a simple matter of fact, because they were denied access the relevant evidence (see Points I, II, III, VII, and IX) nor was it made clear to them that as a matter of logic the case was closed.

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[7] The illustrative cases in Restatement of Torts, 2d, 442 A and B, 447 and 449 are especially clear and illuminating on the issue at hand. (See Reply Brief, Appendix 3 and pp. 42-44.)

The Court of Appeals' grounds for their decision to reject the appeal are confusing. First it is stated that generally proximate causation is taken to be a determination of fact to be made by the jury. This may be true in general; but Ostler has argued that it is not true in this case. Moreover, even if it were true, the jury had already been denied access to relevant evidence and could not make the determination. The Court of Appeals' decision does not address this argument.

Second the Court of Appeals states that "'proximate cause' is one of the essential elements of a negligence action" (Opinion, p. 10). This implies that without proximate causation, one cannot find negligence. But, this supports Ostler's claim, and cannot, therefore, count as a reason for denying that appeal. It is perfectly opaque why the Court of Appeals makes this citation. What follows on p. 10 of the Opinion is equally unmotivated. It seems correct, but neither adds to nor contradicts any of Ostler's arguments or contentions. In short, the entire section on p. 10 stands as an enigma in the Court of Appeals' reasoning.

Conclusions

As already stated, it is difficult to understand how this Opinion could have been endorsed by three judges. I can only conclude that in reaching its decision, the Court of Appeals failed to take into account many important aspects of the arguments made in the appeal; at several points the Court of Appeals' argumentation is beside the point and fails to address the arguments made in the appeal. Due to time pressures or misunderstandings, a single individual might fail to grasp the points at issue and the structure of the plaintiff's arguments; however, it seems highly unlikely that three individuals could all have made the same errors in analysis. I can only conclude that the Opinion was the product of a single judge (Bench), and that the other two judges signed it without giving the briefs the careful and detailed reading and analysis which they deserved and required.

DATED this 21st day of September, 1989.

By: Patricia Hanna
PATRICIA HANNA

Subscribed and sworn to before me this 21st day of September, 1989.

Kathanne D. Palmer
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Professional Employment	Chair, Department of Philosophy		1984-present
	Associate Dean, College of Humanities		1983-1984
	Associate Professor of Philosophy, University of Utah (tenure awarded 1979)		1979 - present
	Assistant Professor of Philosophy, University of Utah		1972-79
	Lecturer in Philosophy and Religion, University of Cincinnati		1972
	Teaching Assistant, University of Cincinnati		1967-70, 1971-72
Consulting	Observer/Evaluator and Resource Person, HERS/West Conference on Leadership and Management Skills, August, 1979. (As HERS/Mid-Atlantic representative, responsibilities included preparation of written evaluation for National Office.)		
	Utah State Planning Board, American Council on Education/NIP, 1980-83.		
Special Recognition	Selected by American Council on Education/National Identification Program as one of Utah women with highest qualifications in academic administration.		1982

	Board of Advisors, Utah Consortium of Women in Higher Education.	1987-present
Academic Honors	Honors in Philosophy, University of Cincinnati	1967
	Honored as one of outstanding faculty women, University of Utah, by University Faculty Women's Club	1974
	Phi Kappa Phi	1984
Scholarships and Research Grants	President's Scholarship, University of Cincinnati	1966-67
	Charles Phelps Taft Research Fellowship	1970-71
	University of Utah Summer Research Grant	1973
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Major Areas of Teaching: Logic, Philosophy of Language, Political Philosophy, Ethical Theory, Philosophy of Mind

Major Areas of Research: Philosophy of Language, Philosophy of Mind, Philosophical Logic

Invited Presentations:

"The Problem of Counterfactuals and Singular Causal Laws," University of Utah, May, 1972.
"What Might Speakers 'Tacitly Know'?," Utah Academy of Sciences, Arts and Letters, December, 1977.
"Searle on Cognition," Cognitive Study Group, University of Utah, October 1983.
"The Turing Test and Toes," Department of Psychology Colloquium, University of Utah, May 1984.

Publications

Papers:

"A Hypothesis Concerning Singular Causal Laws," The Journal of Philosophical Linguistics, Spring, 1972.

"Declaratives, Performatives and Grammar," The Journal of Philosophical Linguistics, Spring, 1973.
"Origin and Necessity," Philosophical Studies, November, 1977.
"What Might Speakers 'Tacitly Know'?," Encyclia, Fall, 1977.
"Children's Liberation," (co-author: T.M. Reed), Philosophy, April, 1980.
"On Sameness and Necessity," Philosophical Investigations, Spring, 1981.
"Philosophy, Children, and Liberal Education" (co-author: T. M. Reed), Improving College and University Teaching, Fall, 1981.
"Developmental Theory and Moral Education" (co-author: T. M. Reed), Teaching Philosophy, January, 1982.
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"Causal Powers and Cognition," Mind, January 1985.
"Translation, Indeterminacy and Triviality, "Philosophia, January 1986.

Reviews

Review of Gilbert Harman (ed.), on Noam Chomsky: Critical Essays, Teaching Philosophy, Spring, 1976.
Review of Jerry Fodor, The Language of Thought, Philosophical Investigations, Spring, 1979.
Review of G. N. Georgacarakos and Robin Smith, Elementary Formal Logic, Teaching Philosophy, Spring, 1979.
Review of Mark Platts, Ways of Meaning, Teaching Philosophy, Fall, 1979.
Review of Onora O'Neill and William Ruddick (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Ethics, July, 1981.
Review of William Aiken and Hugh LaFollette (eds.), Whose Child?: Children's Rights, Parental Authority and State Power, Ethics, October, 1981.
Review of Howard Cohen, Equal Rights for Children, Ethics, April, 1982.
Review of Anthony O'Hear, Education, Society and Human Nature, Ethics, April, 1982.
Review of R. M. Martin, Semiotics and Linguistic Structure, Review of Metaphysics, Vol. 35, No. 4, June, 1982.
Review of Matthew Lipman, Ann Margaret Sharp and Frederick S. Oscanyan, Philosophy in the Classroom, 2nd Edition (co-author: T. M. Reed), Teaching Philosophy, Vol. 5, No. 3, July, 1982.

Review of Matthew Lipman, Lisa and Matthew Lipman, Ann Margaret Sharp and Fredrick S. Oscanyan, Ethical Inquiry, Teaching Philosophy, Vol. 5, No. 3, July, 1982.
Review of Shalom Lappin, Sorts, Ontology, and Metaphor, Review of Metaphysics, Vol. 36, No. 3, March, 1983.
Review of Karen Iverson Vaughn, Locke, The Economic Forum, forthcoming.

Review of Jerrold Katz, Language and Other Abstract Objects, Review of Metaphysics, forthcoming.
Review of Eli Hirsch, The Concept of Identity, Review of Metaphysics, forthcoming.

Major University Committees (recent)

Computer Literacy	1983-84
Computer Steering (drafted plan for use and acquisition of University computing resources)	1984-85
Accreditation Review (drafted statement of U's mission and self-assessment)	1986-87
Graduate Council	1986-87
Annuities and Salaries	1985-87
Institutional Review Board for experiments involving human subjects (Medical School)	1987-1989
Academic Freedom and Tenure	1982-85
	1985-87
Vice Chair 1988-89	1988-91
Chair	1989-present
Academic Senate	1989-1992